Office-Supreme Court, U.S.
FILED
FEB 13 1967
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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1057

CLIMAX CHEMICAL COMPANY,

Petitioner,

v.

C. F. BRAUN & CO., a corporation;
PENNSALT CHEMICAL CORPORATION, a corporation;
J. T. THORPE, INC., a corporation;
HEYWARD-ROBINSON COMPANY, a partnership;
BERNARD GOODMAN and ALEXANDER SOMMER,
partners composing said partnership;
THERMAL RESEARCH & ENGINEERING CORPORATION, a
corporation; STEPHENS-ADAMSON MFG. CO., a corporation;
STANDARD STEEL CORPORATION, a corporation;
and BEAUMONT BIRCH COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Climax Chemical Company, prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Tenth Circuit (App. B), which affirmed the order of the United States District Court for the District of New Mexico (App. A), denying plaintiff's motion to remand this action to the District Court of Lea County, New Mexico. The appeal from the interlocutory order of the district court was perfected in accordance with 28 U.S.C. § 1292(b) (App. A, App. D, App. E.).

Opinions Below

A copy of the order of the United States District Court for the District of New Mexico from which the interlocutory appeal was taken is copied herein as Appendix A. The majority opinion of the United States Court of Appeals for the Tenth Circuit affirming the order denying Petitioner's motion to remand is copied herein as Appendix B. The dissenting opinion of Judge Kerr is copied herein as Appendix C. The order of the United States Court of Appeals for the Tenth Circuit allowing the interlocutory appeal on certification and application under 15 U.S.C. § 1292(b) is copied herein as Appendix D. The opinions copied herein as Appendix B and Appendix C have not yet been reported.

Jurisdiction

The order of the United States District Court for the District of New Mexico denying petitioner's motion to remand and certifying the ruling for appeal under 15 U.S.C. § 1292(b) was signed and entered on December 15, 1965 (Tr. 37-39). Petitioner's application for leave to file an interlocutory appeal was filed in the United States Court of Appeals for the Tenth Circuit and was granted by that court on January 19, 1966 (Tr. 39-40). Petitioner filed its notice of appeal on January 24, 1966 (Tr. 40), and thereafter duly perfected such appeal. The opinion and order of the United States Court of Appeals for the Tenth Circuit affirming the order of the district court was filed on December 29, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether in the absence of total diversity of citizenship a state court action against a single defendant for the entire damages resulting from faulty engineering and design and faulty equipment rendering plaintiff's chemical plant totally inoperable and against the other defendants for the portion of the total damages for which each is alleged to be responsible is properly removable to the United States District Court under 28 U.S.C. § 1441(c) as involving separate and independent claims or causes of action.

(2) Whether 28 U.S.C. § 1441(c) when construed to permit removal of this action from the state court to the federal court in the absence of complete diversity of citizenship between the plaintiff and the defendants contravenes the provisions of the United States Constitution limiting the jurisdiction of federal courts.

(3) Whether a removal bond executed by a single defendant as principal and its surety company is sufficient to constitute a removal bond for all defendants under 28 U.S.C. § 1446(d) when the other defendants filed separate instruments purporting to join in the bond during the statutory period but the surety executed no agreement to their addition to its bond as additional principals until long after the expiration of the statutory period.

STATUTES INVOLVED

28 U.S.C. § 1441(c):

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

Article III, Section 2 of the Constitution of the United States:

> "Section 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

28 U.S.C. § 1446(b):

> "The petition for removal of a civil action or proceeding shall be filed within 20 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 20 days after the service of summons upon the defendant if such initial pleading has been then filed in court and is not required to be served on the defendant, whichever period is shorter."

28 U.S.C. § 1446(d):

> "Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

Statement of the Case

Petitioner brought this action against respondents C. F. Braun & Co., et al, in the District Court, Fifth Judicial District, Lea County, New Mexico, seeking recovery of $3,600,000 from the respondent Braun as the total damages and seeking recovery from the other respondents of portions of such total damages suffered by petitioner because of defective design and defective engineering of a salt cake and muriatic acid plant designed and engineered by Braun for Petitioner in Lea County, New Mexico, and because of the purchase by Braun, for Climax, from the other respondents of equipment defectively designed or engineered by them for such plant (Tr. 4-25).[1] Respondent Braun by written contract guaranteed that the plant when constructed as designed and engineered would produce and process 100 tons of salt cake and 150 tons of muriatic acid per day. Because of such defective design, defective engineering, and defectively designed and engineered equipment purchased by Braun for Climax from the other respondents, the plant when completed was inoperable and incapable of producing either salt cake or muriatic acid in any commercial quantities (Tr. 7). Respondent Braun by purchase order or subcontract delegated to the other respondents the furnishing of certain of the design and engineering services and the furnishing of certain of the engineered equipment constituting integral parts of the single plant project. Each of such other respondents is sued for a part but not all of the total damages occurring as a consequence of a single injury suffered by petitioner, i.e., a completed plant that would not function or produce the intended products in any commercial quantity. In all instances the other respondents are sued for that part of the total

[1] All references herein to Tr. are to the printed Transcript of Record in the United States Court of Appeals.

damages attributable in each case to the defective design, defective engineering, or the furnishing of defectively engineered equipment by the particular respondent (Tr. 11).

Complete diversity of citizenship between petitioner and respondents does not exist because petitioner and respondent Thermal Research and Engineering Corporation are both incorporated under the laws of the State of Delaware (Tr. 4, 33). However, the respondent Stephens-Adamson Mfg. Co., filed its petition for removal executed by it alone in the United States District Court for the District of New Mexico along with a removal bond executed by it alone as principal and by Western Surety Co. as surety (Tr. 25-29), the removal being predicated on claimed diversity of citizenship, and five days thereafter Stephens-Adamson Mfg. Co. filed its amended petition for removal, executed by it alone, alleging as grounds the requisite jurisdictional amount and diversity of citizenship between all respondents and petitioner or, in the alternative, that there were separate and independent claims or causes of action entitling Stephens-Adamson Mfg. Co. to remove under 28 U.S.C. § 1441(c) (Tr. 29). Within 20 days after service of process upon them, each of the other respondents separately filed a so-called "joinder in removal proceedings", reciting in each instance that each such respondent "accepts and agrees to all the terms and conditions of the petition for removal and amended petition for removal and agrees to be bound by the removal bond which has been filed in this cause, the same as if this defendant had signed such bond in the first instance" (Tr. 32-33). However, none of the other respondents either filed its own separate removal bond or signed the bond previously filed by Stephens-Adamson Mfg. Co., as principal, and Western Surety Company, as surety. The surety on the removal bond of Stephens-Adamson Mfg. Co.

executed no written consent or agreement to the other respondents becoming principals on the removal bond on which it was surety, nor did it in any manner ratify the purported joinder of such other respondents as principals on such bond.

Petitioner filed its motion to remand including the grounds that no respondent except Stephens-Adamson had filed a removal bond as required by 28 U.S.C. § 1446(d) and that the cause of action sued upon is not separate or independent in the case of any respondent, but rather there is a single cause of action and each respondent is jointly and severally liable thereon for a part of the total damages flowing from a single injury (Tr. 34). The District Court denied petitioner's motion to remand but certified such ruling for interlocutory appeal in accordance with § 1292(b) of Title 28, United States Code (Tr. 37). The respondents who failed to file removal bonds subsequent to the hearing on the motion to remand under leave granted by the District Court in denying such motion executed and attached a rider to the removal bond of Stephens-Adamson in which the surety joined (Tr. 36-39). This rider, which only purports to be effective as of the date of its execution, was executed and filed long after the expiration of the statutory period for filing the petition and bond for removal (Tr. 36). Petitioner filed its application to appeal under § 1292(b), Title 28, United States Code, within the time provided by law and the United States Court of Appeals for the Tenth Circuit granted such application (App. D). Thereafter, Petitioner duly perfected the appeal (App. E). The majority of the United States Court of Appeals affirmed the order of the district court denying the motion to remand (App.), with Judge Kerr dissenting (App. C).

Reasons For Granting The Writ

I.

The Decision On Separate And Independent Causes Of Action Conflicts, At Least In Principle, With Prior Decisions Of The United States Supreme Court.

The $3,600,000 total damages for which the respondent Braun is sued *includes the portions thereof for which the other respondents are alleged to be also liable.* The majority opinion of the Court of Appeals holds these portions of the total damage for which the other respondents are also liable to be "separate and independent causes of action" because Respondent Braun placed separate portions of the total work with the other respondents under separate purchase orders or subcontracts, emphasizing "in the light of the dissenting opinion" that each separate respondent had a "separate, independent contract" (App. B, p. 8a). The majority reasoned therefore that the suit against each respondent was "a separate and independent cause of action".

This rationale misapplies and violates the principle of *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6 (1951). In Finn, the suit was upon "separate and independent" contracts of insurance entered into with separate defendants, but this Court held that the suit was not upon "separate and independent causes of action" under Section 1441(c) which prevented removal in the absence of complete diversity. It was so held even though the primary count in the resident plaintiff's complaint was against a non-resident insurance company defendant alleged to have issued a fire insurance policy covering the plaintiff's property which was destroyed by fire, a second and alternative count was against another non-resident insurance company defendant alleged to have issued another fire insurance policy covering the destroyed property, and the third alternative count was by the resi-

dent plaintiff against the two non-resident insurance company defendants and a resident individual defendant alleged to be the agent of both in which joint and several liability on the part of all three defendants was asserted. These separate contracts and the three separate counts were held not to result in "separate and independent causes of action" within the meaning of Section 1441(c). The fact that the plaintiff Finn sought recovery of total damages against a single defendant in the primary count, total damages against a different single defendant in the second alternative count, and total damages jointly and severally from three defendants in the third alternative count does not distinguish the case in principle from the present case in which the petitioner seeks recovery of total damages from the respondent Braun and seeks judgment against the other respondents for portions but not all of that same damage.

In *Finn* at 341 U.S. 16 the Court emphasized that there was damage from a single fire and that "the facts in each portion of the complaint involved" the individual defendant. Here, there is a single plant and single total damages resulting because that plant was inoperable and incapable of producing the products for which it was intended in any commercial quantities. Here, too, "the facts in each portion of the complaint involved" Braun. All of the respondents contributed integral parts of equipment or services to the single plant and to the single injury, i.e., the inoperable plant, each respondent contributed a portion, although the respondent Braun was liable for the total.

The majority opinion achieves its result of declaring the action as to each respondent "a separate and independent cause of action" by isolating each unit or piece of plant equipment upon which a particular respondent performed services or furnished equipment as a "separate and independent unit" divorced from all of the remainder of the

plant and from the plant as a whole. The majority opinion does so in the following language:

> "In the case at bar it is true that it is alleged that plaintiff's plant would not function, but in no real sense was this a single loss. The plant was composed of a number of separate units. *Obviously, whether one unit, or several, failed to function, the plant could not operate.* The liability of the defendants other than Braun was separate, distinct, and unrelated. With the exception of Braun, no defendant assumed responsibility for other than its own unit, or was liable in any way for the failure of the others." (App. B, p. 9a) (Emphasis Supplied.)

The foregoing statement, particularly the italicized language, constitutes a finding of fact without any evidence having been introduced and is completely without any support in the petitioner's pleadings. It is the theory of the petitioner's complaint that "the plant when completed would not function or operate and could not be put to its intended use of manufacturing salt cake and muriatic acid" (Tr. 8) as the result of the totality of the defaults and defects in engineering, design, and equipment on the part of the respondent Braun and all of the other respondents. Petitioner alleges in paragraph 14 of its complaint (Tr. 8) that the plant "would not produce any commercial quantity of either salt cake or muriatic acid" not only because of the defective design and engineering by the defendant Braun but because of "the engineered equipment as purchased by the defendant Braun". The "engineered equipment" which was defective and which in each instance contributed to the plant failure was purchased from the other respondents.

The allegations of the petitioner's complaint with reference to the defective design, equipping, and construction

of the reactor are to the effect that the Respondents Braun, Pennsalt, Heyward-Robinson, Bernard Goodman, Alexander Sommer, and Thorpe, each and all committed defaults that resulted in the reactor installed in the plant being totally inoperable and worthless (Tr. 12-17). Subsequent allegations of the complaint show that the respondent Thermal, the resident defendant, was guilty of defective and unsound design and construction of a salt preheater and salt evaporator and an air acid heater engineered, designed, and furnished by it for use with this same reactor (Tr. 17-19). Indeed the respondent Thermal designed and furnished all of the heating for the reactor itself and it was defective and insufficient. Subsequent allegations of petitioner's complaint show that the respondent Stephens-Adamson Mfg. Co. engineered, designed, and furnished conveyors to convey salt to and from the preheater designed, engineered, and furnished by Thermal and to convey salt to the reactor and salt cake from the reactor and that such conveyors were totally inoperable and incapable of performing their intended duties (Tr. 19-21). Petitioner's complaint next alleges that respondent Standard Steel Corporation engineered, designed, and furnished a combination rotary dryer-heater "intended to preheat the salt particles before they were conveyed into the reactor" again designed to serve this same reactor and that the same "was not designed and constructed in a good and workmanlike manner and in fact was not fit for the purposes for which it was intended" (Tr. 21-22). Finally, petitioner's complaint alleges that the respondent Beaumont Birch designed and furnished four special rotary valves "required for use in connection with feeding and discharging the reactor" and that these valves furnished to serve this same reactor "were unfit and unusable for such use and became completely inoperative and unusable after a few minutes use" (Tr. 22-23). Petitioner averred not only its reliance upon

the "superior engineering skill and competence" of the respondent Braun but upon that of "its recommended subcontractors and suppliers" (Tr. 24), who were the other respondents.

It is apparent from this summary of the petitioner's pleading, despite the statement quoted from the majority opinion, that while separate purchase orders or subcontracts were issued to each respondent, their equipment and services were so inextricably interrelated and interconnected that the action against them cannot properly be regarded as "separate and independent causes of action" against each of them, but only as a single cause of action based upon a single injury, i.e., an inoperable plant incapable of performing its intended purpose, for all of which the respondent Braun is liable in total damages and to which each other respondent contributed in part and is liable in part. As stated in *Finn* at 341 U.S. 14:

> "In making this determination we look to the plaintiff's pleading, which controls."

In looking to the petitioner's pleading it must be concluded here as in Finn "that where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under Section 1441(c)."

The majority opinion of the Court of Appeals totally ignores the fact that the action is indisputably a single cause of action for total damages against the respondent Braun and that the decisions would not permit splitting this cause of action into a series of separate suits against Braun. *Martin* v. *Broderick,* 177 F. 2d 886 (10th Cir. 1949); *Fidelity and Deposit Co.* v. *Hobbs,* 144 F. 2d 5 (10th Cir. 1944); and *United States* v. *Sinclair Prairie Refining Co.,* 126 F. 2d 827 (10th Cir. 1942). Being a single, inseparable

cause of action against the respondent Braun for the total damages, it necessarily follows that it cannot be split into a series of so-called "separate and independent causes of action" against the other respondents who caused part but not all of the single total injury and who are liable for part but not all of the same total damages.

II.

The Decision Gives No Effect To The Statutory Revisions Made By 28 U.S.C. § 1441(c) And Departs From The "Surer Tests" Contemplated By The Finn Case In Removal Cases.

The majority opinion declares:

> "We take *Finn* to mean that there must be substantive separability, and no more." (App. B, p. 10a).

Finn is so limited and this test is applied despite the repeated emphasis in *Finn* that "separability" has not been the test since September 1, 1948, when 28 U.S.C. § 1441(c) superseded 28 U.S.C. (1946 ed.) § 71. *Finn* emphasizes that an important Congressional purpose "was to limit removal from state courts" and that in the revision made by Section 1441(c) Congress "carried out its purpose to abridge the right of removal" (341 U.S. 10). The effect of Section 1441(c) is then stated at 341 U.S. 11 as follows:

> "A separable controversy is no longer an adequate ground for removal unless it also constitutes a separate and independent claim or cause of action. * * * Congress has authorized removal now under Section 1441(c) only when there is a separate and independent claim or cause of action. Of course, 'separate cause of action' restricts removal more than 'separable controversy'. In a suit covering multiple parties or issues based on a single claim, there may be only one cause of action and yet be separable controversies. The addi-

> tion of the word 'independent' gives emphasis to congressional intention to require more complete disassociation between the federally cognizable proceedings and those cognizable only in state courts before allowing removal."

The majority opinion has given no effect to the revision made in the removal test by Section 1441(c) as enunciated in the *Finn* case. It has permitted removal on the basis of no more than the "separable controversies" rather than requiring "separate and independent causes of action" as delineated in *Finn*.

It should be stated here as it was stated in *Finn* at 341 U.S. 16:

> "The past history of removal of 'separable' controversies, the effort of Congress to create a surer test, and the intention of Congress to restrict the right of removal leads us to the conclusion that separate and independent causes of action are not stated."

III.

The Majority Opinion Of The Court Of Appeals Conflicts, At Least In Principle, With Its Own Prior Decisions And With Decisions Of Other Courts Of Appeals.

Prior decisions of the United States Court of Appeals for the Tenth Circuit clearly delineated the distinction not observed in the majority opinion in the present case between the "separable controversy" which would permit removal under the prior statute and the "separate and independent claim or cause of action" required since September 1, 1948, under 28 U.S.C.A. § 1441.

In *Willoughby* v. *Sinclair Oil & Gas Co.*, 188 F. 2d 902 (10th Cir. 1951), the court held that separate and distinct

acts of negligence on the part of each of the three defendants which all caused or contributed to causing a propane gas explosion which resulted in a single injury were not "separate and independent claims or causes of action", stating at 188 F. 2d 905 that under the statute a single cause of action "may be stated in the alternative, hypothetical or conditional, either in one or separate counts".

In *Snow* v. *Powell,* 189 F. 2d 172 (10th Cir. 1951), the court held that an action against a non-resident defendant whose negligence was alleged to have resulted in a willful assault on the plantiff by the resident defendant did not allege "separate and independent claims or causes of action", stating that while "the complaint charged two wrongs" that such wrongs "coacted to cause a single injury" and that the two wrongs were not independent. The concurring opinion stated that an action against multiple defendants based upon a single injury for which but one recovery was sought could not constitute "separate and independent claims or causes of action" "no matter how many defendants are said to be liable therefor, or how diverse the basis of their liability".

In *Donahue* v. *Warner Bros. Pictures, Inc.,* 194 F. 2d 6 (10th Cir. 1952), the court held that an action against numerous defendants based upon a motion picture film which some defendants produced, other defendants distributed, and still other defendants exhibited in numerous different theaters, did not state separate and independent claims or causes of action because "as pleaded all the defendants joined in such wrong."

In *McLeod* v. *Cities Service Gas Co.,* 233 F. 2d 242 (10th Cir., 1956), the court held that a damage action for injuries to plaintiff's land alleged to have been committed by the nonresident defendant in performing clean-up operations

on the land as a lessee, and by the resident defendant in performing certain work on three wells on the land under contract from the nonresident defendant lessee, did not allege separate and independent claims or causes of action "even though the alleged negligent acts of Miller and those of Cities Service were committed separately and at different times, for they could have concurred to produce one wrong for which they would be jointly or severally liable in one judgment". The court further stated:

> "At most the contract makes explicit the separability of the acts of Miller and Cities Service. It does not completely negate the concurrence of the two acts to cause a single wrong, and it does not therefore manifest a separate and independent cause of action within the meaning of Section 1441(c)".

In *Gray* v. *New Mexico Military Institute*, 249 F. 2d 28 (10th Cir. 1957), the court held that a damage action for personal injuries containing one count against two resident defendants predicated on negligence and a second count against a non-resident defendant insurance company predicated upon an alleged breach of a contract of insurance of which the plaintiff was averred to be a third party beneficiary did not state separate and independent claims or causes of action because:

> "A pleading which alleges but one wrong, for which single relief is sought, cannot constitute a separate and independent claim, no matter how many defendants are said to be liable therefor, or how diverse their basis of liability".

The majority opinion in the present case seems clearly contrary, at least in principle, to all of these prior decisions of the United States Court of Appeals for the Tenth Circuit.

Furthermore, the majority opinion in this case seems to be in clear conflict with the decision of the United States Court of Appeals for the First Circuit in *Charles Dowd Box Co.* v. *Fireman's Fund Insurance Co.*, 303 F. 2d 57 (1st Cir. 1962), in which an action against 39 insurance companies in 61 counts, each based on either a separate fire insurance policy or a separate business interruption policy, was held not to state separate and independent claims or causes of action because the claims were all the result of the total injury to plaintiffs' property resulting from two fires which occurred five days apart. The opinion states in part:

> "The plaintiffs' claims against the several insurance company defendants are separate and independent in the sense that each claim against each insurance company is under a separate policy independently negotiated. * * *"

After discussing and quoting from the *Finn* case, the opinion continues:

> "In the case at bar the plaintiff suffered a single loss. The two fires five days apart are, of course, to be treated for present purposes as one and the wrong alleged is the defendants' failure to pay compensation for it, which is the same wrong alleged by the plaintiff in the Finn case. * * * Moreover the plaintiffs' transactions with the insurance company defendants in this case are more 'interlocked' than in Finn. In fact the transactions in the case at bar are not only interlocked but interwoven by reason of the identical pro-rata and co-insurance clauses" (303 F. 2d 60, 61).

The only predicate the majority opinion in the instant case has for holding the cause of action against each respondent to be separate and independent is that each claim is under a "separate" purchase order or subcontract "in-

dependently negotiated" just as was the case with the 61 separate and independent insurance policies sued upon in the *Dowd Box* case. In the case at bar, as in that case, the petitioner suffered a single loss, i.e., $3,600,000 damages because of a totally inoperable plant that would not produce the products for which it was intended. Under petitioner's pleadings, the defaults of each respondent contributed to the single loss and the performance of each respondent was interlocked and interwoven through purchase orders or subcontracts with Braun for integral, interlocked, and interwoven parts of a single integrated plant. Here, as there, the respondents other than Braun are liable for part, but not all, of the total damages flowing from the single injury. The two cases are in clear conflict at least in reasoning and principle.

IV.

Construing 28 U.S.C. § 1441(c) To Permit Removal Of Separate And Independent Causes Of Action In Absence Of Complete Diversity Of Citizenship Of Doubtful Constitutionality.

Even if the cause of action against the Respondents Braun and Thermal could properly be held to be separate and independent from the cause of action against Braun and the other respondents, its removal from the state court to the federal court would be of doubtful constitutionality because of the absence of complete diversity of citizenship. Some leading authorities have expressed grave doubts about the constitutionality of Section 1441(c) to the extent that it permits such removals, Wright, *Federal Courts* § 39, Cohen, *Problems in the Removal of a "Separate or Independent Claim or Cause of Action"*, 46 Minn. L. Rev. 1, while others flatly conclude that the statute is unconstitutional under Article III, Section 2, of the Constitution of

the United States, when so construed and applied, Lewin, 66 Harv. L. Rev. 423.

Wright states at page 117:

> "Only a handful of cases have been removed under § 1441(c) since the Supreme Court construed it in the Finn case, and a strong argument can be made that in permitting removal in those cases the district courts applied the statute erroneously, or that the removal was unconstitutional.
>
> * * *
>
> "Few, if any, diversity cases can properly be removed under this statute in the light of the construction placed on it in the Finn case. Writing in 1961, Professor Cohen listed 24 such cases in which removal had been permitted but noted that there is substantial doubt as to the propriety of removal, evidenced by other cases denying removal in similar circumstances, and many of those cases."

Wright points out that the prior removal of "closely related" but separable controversies could be sustained on the ground of an ancillary or pendent jurisdiction over the closely related controversy as to which diversity of citizenship was absent but that such a ground is "hardly available under § 1441(c), where the criterion for removal is that the claims are entirely unrelated". He then concludes at page 119 that the statute "if read literally, certainly means that there will be some cases where a federal court will have jurisdiction of a non-federal claim, though diversity is absent and though the claim bears no relation to any federal claim in the case. This poses a serious constitutional question".

The Court of Appeals for the Fifth Circuit has expressed doubt as to whether § 1141(c), so construed and applied, is constitutional, *Finn* v. *American Fire & Casualty Company,*

207 F. 2d 113, 116 (5th Cir., 1953). The Court of Appeals for the First Circuit in *Charles Dowd Box Co., Inc.* v. *Fireman's Fund Insurance Co.*, 303 F. 2d 57, 61 (1st Cir., 1962), stated that one of the considerations supporting its decision that "separate and independent" claims or causes of action were not present was that "our conclusion avoids coming to grips with the argument, made by Lewin in the Harv. L. Rev. article cited above, that Section 1441(c) exceeds the constitutional limitation on the jurisdiction of the federal courts in both federal question and diversity cases."

The same considerations are equally applicable here. It is admitted that all of the respondents in this case are properly joined as defendants. Wright at page 118 states that proper joinder rules out the presence of "separate and independent" causes of action, stating:

> "The relation which the joinder of parties rules require is just the kind of relation which, according to the Finn case, bars resort to Section 1441(c)."

The adoption of Wright's criterion for removal under § 1441(c) that the claims must be "entirely unrelated" prevents the constitutional issue from ever being reached. It cannot be seriously contended that the claims against the various respondents in this case are "entirely unrelated". If it was so concluded, the removal of the action against Braun and Thermal in the absence of complete diversity of citizenship would probably be unconstitutional.

V.

Whether The Removal Bond Of A Single Defendant Can Effect Removal For Multiple Co-Defendants Is An Important Federal Statutory Question Which Has Not Been But Should Be Decided By The United States Supreme Court.

Respondent Stephens-Adamson Co. alone executed and filed a removal bond which in the first line thereof named Stephens-Adamson Mfg. Co. alone as principal (Tr. 25-26). The purported joinder of the other respondents in the removal bond was in no way approved, ratified, or agreed to by the surety on the removal bond (Tr. 32-33). The other respondents did not undertake to become additional principals to the removal bond until December 3, 1965, and the surety company in no way ratified or agreed to their becoming such principals until that date, when the rider to the removal bond was filed (Tr. 36), long subsequent to the expiration of the statutory 20-day period during which petition and bond for removal must be filed.

The majority opinion nevertheless holds the bond to be sufficient to effect removal for all respondents simply because the word "petitioners" is used in one point in the bond even though it is clear from the first line in the bond and from the execution thereof (Tr. 25-26) that only Stephens-Adamson Mfg. Co. is a principal to the bond. The word "Principals" also appears at the end of the bond under the signature of the single principal. The obviously inadvertent and inaccurate use of the words "Petitioners" and "Principals" when on the face of the instrument there is only one is a farfetched and feeble point indeed upon which to hang the holding.

It is well established that *all* defendants must join in the removal. 28 U.S.C. § 1441(a); *Gableman* v. *Peoria D. & E. R.R.*, 179 U.S. 335 (1900); *Chicago, R.I. & P. R.R.* v. *Martin*, 178 U.S. 245 (1900). At the time of this attempted removal 28 U.S.C. § 1446(b) required that a petition for removal be filed within 20 days after service of complaint or summons. This 20-day time period is mandatory and jurisdictional. 1 *Barron & Holtzoff, Federal Practice & Procedure*, § 107 (Wright ed. 1963). 28 U.S.C. § 1446(d) makes it mandatory that "each petition for removal" of a case from the state court to the United States District Court "shall be accompanied by a bond with good and sufficient surety" and such bond must be "conditioned that the defendant *or defendants* will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed". It has been held that filing of the bond "within the time limited for removal" along with the removal petition "is essential to 'effect the removal' ". *Nelson* v. *Peter Kiewit Sons Co.*, 130 F. Supp. 59 (D.N.J. 1955); *Richlin Advertising Corp.* v. *Central Florida Broadcasting Co.*, 122 F. Supp. 507 (S.D.N.Y. 1954). Hence, it clearly appears that the filing of the rider to the removal bond in which the other respondents for the first time became principals upon the removal bond and in which the surety company for the first time agreed to their being principals was totally ineffectual since it came long after the expiration of the 20-day statutory period and after hearing on petitioner's motion to remand the case to the state court.

The purported joinder by the other respondents in the removal bond of Stephens-Adamson Mfg. Co., to which the surety company did not assent until more than 60 days later, either was totally ineffectual to make the other re-

spondents parties principal to this removal bond or, if it was effectual, under universally recognized principles of the law of suretyship it discharged the surety on the bond by reason of the addition of further principals without its assent. *Annot., "Liability of Surety"*, 144 ALR at 1267 (1943); *Williston, Treatise on Contracts*, § 1240 at 3552-53; *O'Neal* v. *Long*, 4 Cranch 60, 2 L. Ed. 550 (1807); *Anderson* v. *Bellinger*, 87 Ala. 334, 6 So. 82 (1889). In either event the respondents other than Stephens-Adamson Mfg. Co. had no removal bond during the 20-day statutory period and for more than 60 days thereafter because either a bond on which they are not principals or a bond from which the surety has been discharged by their addition as principals is the equivalent of no bond.

The United States Supreme Court has not decided the question of whether a removal bond perfected by a single defendant as principal can effect the removal for other defendants who have no removal bond during the statutory period. No previous case has ever construed 28 U.S.C. § 1446(d) as requiring a removal bond from only one defendant among multiple defendants. The question is certainly an important question of federal law and of federal statutory construction as it involves a significant point of federal procedure and a substantial question as to the jurisdiction of the federal courts. This is particularly true in view of the general rule that removal procedures must be strictly followed in cases based upon diversity because it is the policy of the federal courts to restrict diversity jurisdiction and to remand doubtful removal cases to the state courts. *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1940); *Wright, Federal Courts*, § 23, at 64-69 (1963); 1 *Barron & Holtzoff, Federal Practice & Procedure*, § 107 (Wright ed. 1963); *Lumbermen's Mutual Cas. Co.* v. *Elbert*, 348 U.S. 48 (1954).

It is respectfully submitted that the petition for writ of certiorari should be granted.

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Climax Chemical Company

CERTIFICATE OF SERVICE

Copies of this petition for writ of certiorari have been mailed, properly stamped and addressed, to all of the attorneys of record for the respondents at their addresses of record.

Attorney for Petitioners

APPENDIX

APPENDIX A

Climax Chem. Co. v. C. F. Braun & Co. et al.

[153]

Order Denying Plaintiff's Motion To Remand And Certifying Questions For Interlocutory Appeal

On the 26th day of November, 1965, came on to be heard the motion of the plaintiff Climax Chemical Company in the above action to remand this cause to the District Court of the Fifth Judicial District in and for Lea County, New Mexico, where said action was filed on August 30, 1965, by plaintiff, and the Court having heard and considered the same and the oral arguments of counsel for plaintiff and of counsel for defendants thereon, and it appearing to the Court that the defendant Stephens-Adamson Mfg. Co., filed its petition for removal, and its bond for removal and its amended petition for removal within twenty (20) days after service of process and of a copy of plaintiff's complaint upon it, and that each and all of the other defendants herein thereafter separately filed a joinder in the removal pro-[154]ceedings reciting in each instance that each such defendant "accepts and agrees to all the terms and conditions of the petition for removal and amended petition for removal and agrees to be bound by the removal bond which has been filed in this cause, the same as if this defendant had signed such bond in the first instance", each such joinder and removal being filed within twenty (20) days after delivery of process and a copy of plaintiff's complaint to said defendant and within twenty (20) days after the first service of process upon any defendant herein, but that none of said other defendants signed the petition for removal, amended petition for removal, or removal bond theretofore filed by defendant Stephens-Adamson Mfg. Co., or a separate petition and

bond for removal; and it further appearing to the Court that the plaintiff Climax Chemical Company and the defendant Thermal Research & Engineering Corporation are both incorporated under the laws of the State of Delaware but that all of the defendants other than the defendant Thermal Research & Engineering Corporation are incorporated in and have their principal places of business in states other than Delaware, or are residents of states other than the State of Delaware; the Court is of the opinion and finds that the removal proceedings are in compliance with the requirements of law, but if there are any technical defects in the removal bond filed herein, any such defects are not jurisdictional and are correctable, and leave to correct the same should be and is granted to correct any such defects, and the defendants have in fact now corrected such defects, if any, by having filed herein Rider to Removal Bond; and the Court further finds that the Claims or causes of action sued upon herein against the defendant C. F. Braun & Co. and the defendants other than the defendant Thermal Research & Engineering Corporation are separate and independent claims or causes of action from the claim or cause of action on which the defendant Thermal Research & Engineering Corporation is asserted in plaintiff's **[155]** complaint to be jointly liable with the defendant C. F. Braun & Co., and said separate and independent claims or causes of action would be removable if sued upon alone, and said separate and independent claims or causes of action are joined with an otherwise non-removable claim or cause of action upon which the defendant Thermal Research & Engineering Corporation is alleged to be jointly liable with the defendant C. F. Braun & Co.; and by reason thereof the claims or causes of action sued upon herein against the defendant C. F. Braun & Co. and the defendants other than the defendant Thermal Research & Engineering Corporation are properly removable under 28 U.S.C.A.

§ 1441(c), and the Court in its discretion should and will try all of the claims or causes of action in this proceeding; but the Court further finds that the rulings of the court should be certified for an Interlocutory Appeal as provided in Section 1292(b) of the Judicial Code (28 U.S.C.A. § 1292(b));

It is accordingly Ordered, Adjudged, And Decreed as follows:

(1) The motion of the plaintiff Climax Chemical Company to remand the above cause to the District Court of the Fifth Judicial District in and for Lea County, New Mexico, is denied.

(2) Pursuant to Section 1292(b) of the Judicial Code (28 U.S.C.A. § 1292(b)), the Court is of the opinion that this order involves a controlling and important question of law in this civil action, that is, whether this Court has jurisdiction of this cause or is without jurisdiction either because the removal proceedings are incurably defective or because diversity jurisdiction is absent by reason of the claims or causes of action asserted against the defendant C. F. Braun & Co. **[156]** and the other defendants as to whom diversity of citizenship with the plaintiff exists not being separate and independent claims or causes of action from that asserted against the defendant Thermal Research & Engineering Corporation jointly with C. F. Braun & Co. The Court is also of the opinion that said question of law is one as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Since the order does not appear to be otherwise appealable, the Court therefore certifies in writing as a part of this order that the requirements for an Interlocutory Appeal as provided in said Section 1292(b) of the

Judicial Code (28 U.S.C.A. § 1292(b)), are present and satisfied and that said order is thereby certified by the Court as being appropriate for an Interlocutory Appeal pursuant to said statute.

Dated and entered this 15th day of December, 1965.

Howard C. Bratton,
United States District Judge.

[Approved as to form
Counsel for plaintiff]
Filed December 15, 1965.

APPENDIX B

Judgment

Thirty-Second Day, November Term,
Thursday, December 29th, 1966.

Before Honorable Jean S. Breitenstein and Honorable Bailey Aldrich, Circuit Judges, and Honorable Ewing T. Kerr, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

FILED
United States Court of Appeals
Tenth Circuit
Dec 29 1966
S/Robert B. Cartwright
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER TERM 1966

No. 8654

CLIMAX CHEMICAL COMPANY,

Appellant,

v.

C. F. BRAUN & Co., a corporation; PENNSALT CHEMICAL CORPORATION, a corporation; J. T. THORPE, INC., a corporation; HEYWARD-ROBINSON COMPANY, a partnership, Bernard Goodman and Alexander Sommer, partners composing said partnership; THERMAL RESEARCH & ENGINEERING CORPORATION, a corporation; STEPHENS-ADAMSON MFG. CO., a corporation; STANDARD STEEL CORPORATION, a corporation; and BEAUMONT BIRCH COMPANY, a corporation,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

C. Melvin Neal and Leroy Jeffers (Richard P. Keeton, Tom W. Neal; Vinson, Elkins, Weems & Searls; and Neal and Neal were with them on the brief) for Appellant.

Daniel A. Sisk and James C. Ritchie (Kenneth L. Harrigan and Modrall, Seymour, Sperling, Roehl & Harris;

John B. Tittman and Russell Moore and Keleher & McLeod; David A. Grammer; Duane C. Gilkey and Rodey, Dickason, Sloan, Akin & Robb; David G. Houseman; Schall, Sceresse and Addis; and Willard F. Kitts were with them on the brief) for Appellees.

Before BREITENSTEIN and ALDRICH*, Circuit Judges, and KERR, District Judge.

ALDRICH, Circuit Judge.

This interlocutory appeal, here by virtue of 28 U.S.C. § 1292(b), raises the question of the propriety of the district court's refusal to remand to the state court an action brought by a single plaintiff against a number of defendants for breach of a number of contracts. The plaintiff, Climax Chemical Company, is a Delaware corporation. The principal defendant, C. F. Braun & Co., is a California corporation, and the other defendants are likewise alleged in the complaint, and in the removal papers, to be citizens of states other than Delaware, in which plaintiff was incorporated, and of New Mexico, where plaintiff had its principal place of business and where the action was brought. Following removal, however, it shortly appeared that one defendant, Thermal Research and Engineering Corporation, was incorporated in Delaware. Climax moved to remand for lack of complete diversity, and also because of defendants' alleged failure to comply with the statutory requirements regarding a removal bond. Upon the denial of its motion this appeal was allowed to be taken.

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* By designation.

The motion for remand, *inter alia*, "the claims or causes[1] of action sued upon by plaintiff herein are not separate and independent . . . but . . . this is an action against the defendants in joint and several causes of action and each and all of the defendants are jointly and severally liable with the other defendants *or some of them*." (Ital. suppl.) In its memorandum of decision the district court recited that there were a number of separate and independent claims or causes of action, all of which were removable except the one against Thermal, and that in the court's discretion it would, pursuant to the authority granted by 28 U.S.C. § 1441(c),[2] retain that cause as well as the others.

In its complaint Climax alleged that it desired to construct a salt cake and muriatic acid plant of a certain capacity; that it engaged defendant Braun to undertake responsibility for designing, engineering and purchasing the necessary engineered equipment, that Braun guaranteed the overall operation, and that the other defendants each separately contracted to design, engineer and/or construct various components of said plant. It further alleged that all defendants performed negligently or otherwise improperly, as a result of which the plant proved to be "totally inoperable." Climax sought damages against Braun for both out-of-pocket expenses and operating losses with respect to the entire plant, and for various portions of these losses against the other defendants. More specifically, three

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[1] We italicize this "s" because Climax, by brief, seeks to argue that the suit "involves a single cause of action . . . between appellant and all appellees." Rather than dispose of this contention by pointing out that it was not raised below, we prefer to deal with it directly.

[2] "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

of the defendants, Pennsalt, Thorpe, and Heyward-Robinson, together with Braun were alleged to be jointly and severally liable for damages due to the defective design and construction of the reactor portion of the plant; a fourth defendant, Stephens-Adamson Mfg. Co., was alleged to be jointly and severally liable with Braun for the defective design and construction of a conveyor system; a fifth, Standard Steel, was alleged to be jointly and severally liable with Braun for damages due to the defective design and manufacture of a combination rotary dryer-heater; and a sixth, Beaumont Birch, was alleged to be jointly and severally liable with Braun for the defective design and construction of some rotary valves to be used in the reactor. Finally, Thermal Research and Engineering Corporation, the nondiverse defendant, was alleged to be jointly and severally liable with Braun for the defective design and manufacture of some heating and evaporating equipment for use with the reactor. In the light of the dissenting opinion, it should be emphasized that each of the defendants is charged with making a separate, independent contract, and only one, Braun, agreed "to design, engineer, construct and equip 'a plant . . . that would manufacture 100 tons per day . . . (etc.)' ".

The leading case on section 1441(c) is American Fire & Cas. Co. v. Finn, 1951, 341 U.S. 6. In that case the Court held that a suit brought by a local plaintiff against two out-of-state insurance companies, and a local individual who was the agent for both companies, to recover for a fire loss did not involve "separate and independent" claims. It held this notwithstanding the fact that the parties were not jointly liable, but, rather, only one of them was liable and the purpose of joining them in the suit was to ascertain which of the three it was. The Court repeated its earlier definition of a cause of action as "a single wrongful invasion of a single primary right of the plantiff . . . whether

the acts constituting such invasion were one or many, single or complex." Baltimore S. S. Co. v. Phillips, 1927, 274 U.S. 316, 321. It held that the case before it had been improperly removed, stating that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." 341 U.S. at 14.

Plaintiff seeks to bring itself within this principle. We do not agree. Plaintiff's assertion of a single wrong overstates the rationale. In *Finn* there was one fire, and one single compensable loss. In the case at bar it is true that it is alleged that plainatiff's plant would not function, but in no real sense was this a single loss. The plant was composed of a number of separate units. Obviously, whether one unit, or several, failed to function, the plant could not operate. The liability of the defendants other than Braun was separate, distinct, and unrelated. With the exception of Braun, no defendant assumed responsibility for other than its own unit, or was liable in any way for the failure of the others. We think it clear that there was more than one primary right, and that more than a single wrong was alleged. Absent Braun as a defendant, it is inconceivable that plaintiff could, simply because all the units were to be installed in one plant, say that the separate claims against the several defendants were single and interdependent. Plaintiff would be utilizing local procedural joinder rules to determine inseparability in the diversity sense.

It is true that in 1 Barron and Holtzoff, Federal Practice and Procedure, § 105, at 494 (Wright ed. 1960) it is said, "It is difficult to see how there can ever be a diversity case properly removed under the statute in the light of the construction placed on it in the *Finn* case." We do not take such a morbid view. If the Court was sounding the death

knell of section 1441(c) we believe it would have said so. The Court's statement, 341 U.S. at 10, that one of the purposes of the then recent amendment of the statute was "to limit removal from state courts" was not an announcement that it was to foreclose it. We take *Finn* to mean that there must be substantive separability, and no more.

The only possible question is whether the addition of Braun as a party defendant changes the result. Broken down into its component parts, the complaint makes two kinds of claims against Braun. First, it is alleged to be jointly liable with each of the other defendants for defects in the performance by each defendant of its individual contract. Second, it is alleged to be solely liable for all damages stemming from the inoperable condition of the plant, due to its poor engineering and design, for which none of the other defendants is liable. It may be granted that this latter claim is a single cause of action. However, by its very nature it is separate and independent of the causes of action asserted against the other defendants. Its presence weakens, rather than strengthens, plaintiff's present position. Nor do we think, on any proper analysis, that the fact that Braun was, in effect, a guarantor of the separate performance of each of the other defendants destroyed the separate and independent nature of the claims asserted against each of those defendants. To be sure, Braun could not have removed had the case involved solely a claim against it and Thermal asserting joint liability for the defective furnishing of equipment for the plant. But, as already shown, this case involves a number of additional claims against Braun and the other defendants that are in no way related to the claim against Thermal. The fact that they related to the same plant is not enough. Cf. Greenshields v. Warren Petroleum Corp., 10 Cir., 1957, 248 F.

2d 61, cert. den. 355 U.S. 907; McLeod v. Cities Service Gas Co., 10 Cir., 1956, 233 F. 2d 242.

In *Finn*, after remarking that the facts alleged in each portion of the complaint involved the local agent, the Court reiterated, at p. 16, "(T)he damage comes from a single incident." Here it does not. Climax's allegation in its motion to remand that "all of the defendants are jointly and severally liable with the other defendants or some of them" was both perceptive and accurate. This is not a definition of either a single claim, or of a series of interdependent claims. The cases relied upon by Climax do not support it. In all of them one wrong was alleged by the plaintiff, and the defendants were claimed to be either jointly liable for all the damages, Donahue v. Warner Bros. Pictures, Inc., 10 Cir., 1952, 194 F. 2d 6, Snow v. Powell, 10 Cir., 1951, 189 F. 2d 172, Willoughby v. Sinclair Oil & Gas Co., 10 Cir., 1951, 188 F. 2d 902, liable in the alternative for all the damages, Gray v. New Mexico Military Institute, 10 Cir., 1957, 249 F. 2d 28, or liable for specified parts of the total damage, Charles Dowd Box Co., Inc. v. Fireman's Fund Ins. Co., 1 Cir. 1962, 303 F. 2d 57, Young Spring & Wire Corp. v. American Guar. & Liab. Ins. Co., W. D. Mo., 1963, 220 F. Supp. 222.

Additionally, Climax contends that the case was not properly removed because of the defendants' failure to file an adequate removal bond as required by 28 U.S.C. § 1446(d). The initial petition for removal, although naming all of the defendants as petitioners and in proper form in every other respect, was signed by only one firm of attorneys, who described themselves as counsel for one, diverse, petitioner. The petition was accompanied by a bond of a proper bonding company, in the standard amount, naming only this petitioner as principal. Still within the twenty days the other defendants filed purported joinders

in the removal petition and in the bond. Although it did so in the district court, plaintiff does not now contend that this procedure was improper so far as the petition itself was concerned. Cf. Stangard Dickerson Corp. v. United Electrical Workers, D.N.J., 1940, 33 F. Supp. 449. It continues to press its complaint, however, that the bond was defective, based on the fact that the bonding company's recognition of the other defendants as principals did not occur until well after the twenty day removal period had expired, when it filed a document to that effect.

The condition of the original bond was that

> "the petitioners shall pay all costs and disbursements incurred by reason of the removal proceedings, if it should be determined that the cause was not removable or was improperly removed to this Court."

We consider this entirely adequate. In the event of remand the plaintiff was entitled to only one recovery of its costs. By its reference to the "petitioners" the bond was clearly intended to bind the surety in the event that any of the defendants was remanded and failed to respond to a demand for costs. The fact that all the defendants were not named as principals does not mean that one could not act in their behalf in obtaining a bond that inured to their benefit. It equally inured to plaintiff's. By defendants' timely joinders they individually undertook to pay the costs, to the same degree that they would have had they been named as principals in the bond. By its original bond the surety undertook to pay on their behalf. In the papers which were seasonably filed, therefore, plaintiff received the full requisite undertaking for costs.

Plaintiff's extensive argument lacks any merit. We need not reach the question to what extent a defective bond may be a jurisdictional matter. Cf. National Quicksilver Corp.

v. World Ins. Co., 8 Cir., 1943, 139 F. 2d 1; 1A Moore, Federal Practice, ¶ 0.168, at 1286-87 (1965).

AFFIRMED.

APPENDIX C

No. 8654.

KERR, Judge, dissenting.

With due deference to the well stated general principles of law in the majority opinion, I am unable to agree with the reference of those rules to plaintiff's pleading in this case. The rules are simple; their application is complex. As I read the complaint I cannot discern separate and independent claims for relief. I would hold that this case was improvidently removed to the federal court.

I start with the premise that every doubt as to the right of removal under Section 1441(c) should be resolved in favor of remand. Absent separate and independent claims the case is not removable.[1] We agree on that fundamental rule. Our difference of opinion is in the application of the pertinent test succinctly stated in the *Finn* case:

> "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate or independent claim or cause of action under Section 1441 (c)."[2]

Plaintiff alleges in its complaint only a single claim, namely, its contractural right to have the defendant Braun and his subcontractors and suppliers, exercise their superior engineering skill and experience to design, engineer, construct and equip "a plant * * * that would manufacture 100 tons per day of sodium sulfate (commonly referred to as salt cake) and 150 tons per day of hydrochloric acid (also known as muriatic acid) using as a basic process a process known as the Cannon process * * *".

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[1] American Fire and Casualty Co. v. Finn, 341 U.S. 6 (1951).
[2] Id. at page 14.

One single wrong to plaintiff is alleged in the complaint, namely, defendant breached its contract with plaintiff by designing, engineering, constructing and equipping a plant which "when completed would not function or operate and could not be put to its intended use of manufacturing salt cake and muriatic acid". The facts alleged to have constituted the breach of contract give rise to only one, complete, indivisible cause of action.[3]

The wrong for which plaintiff seeks relief arises from an interlocked series of transactions which are alleged with some particularity, naming each of the defendants and stating the various fundamental and fatal defects, defaults, and acts of negligence in the work of the defendant and its subcontractors and suppliers that combined to produce an unsatisfactory and inoperable plant. The complaint describes the sundry components which were necessary to fulfill the construction contract and for which the several defendants were responsible. These separate controversies do not make separate and independent causes of actions.

Plaintiff alleges one claim for damages against defendant Braun in the aggregate sum of $3,600,000 and itemizes the amounts of damages attributable and allocable to the other defendants. Plaintiff does not seek to recover a money award from the various individual defendants in addition to complete relief from Braun. It appears to me that if plaintiff were to recover a judgment against Braun for a sum of money considerably less than the amount of

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[3] "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action." Baltimore Steamship Company, et al. v. Phillips, 274 U.S. 316, 321 (1927).

damages it claims to have sustained from the breach of the construction contract, plaintiff could not thereafter sue the other defendants to recover the balance up to $3,600,000. Plaintiff asks judgment against Braun for $3,600,000 and "out of that amount" it seeks joint and several judgments against the other named defendants.

As I examine the complaint I cannot escape the conviction that plaintiff has alleged but one cause of action, claim or actionable wrong, viz., a breach of contract. I detect several controversies involving Braun and its subcontractors and suppliers as parties to that breach, but I envision only one possible recovery to which any or all of the defendants could be required to contribute. I would reverse the decision of the trial court and direct that the action be remanded for trial in the state court for failure of complete diversity.

[157]

APPENDIX D

United States Court of Appeals
Tenth Circuit

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

Climax Chemical Company, Plaintiff, I.A. 42 vs. C. F. Braun & Co., et al., Defendants; Civil No. 6345.

This cause came on to be heard on application for leave to appeal from an order of the United States District Court for the District of New Mexico in the above entitled cause and was submitted to the court.

On consideration whereof, it is now here ordered that said application of the above entitled plaintiff for leave to appeal from an order of the United States District Court for the District of New Mexico in the above entitled cause be and the same is hereby granted, and that the notice of appeal shall be filed with the United States District Court for the District of New Mexico within the time fixed by Rule 73(a), Federal Rules of Civil Procedure, for taking an appeal or within ten days from this date, whichever is later.

It is further ordered that a certified copy of this order be transmitted to the clerk of the United States District Court for the District of New Mexico.

Dated January 19, 1966.

a true copy,
Teste:

Filed January 21, 1966. Robert B. Cartwright, Clerk.

[158]

APPENDIX E

Notice Of Appeal

Notice is hereby given that Climax Chemical Company, plaintiff in the above styled and numbered cause, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order of the United States District Court for the District of New Mexico, denying plaintiff's motion to remand said cause to the District Court of Lea County, New Mexico, entered in this action on the 15th day of December, 1965.

Plaintiff, Climax Chemical Company, is appellant and the defendants, C. F. Braun & Co., a corporation, Pennsalt Chemical Corporation, a corporation, J. T. Thorpe, Inc., a corporation, Heyward-Robinson Company, a partnership, Bernard Goodman and Alexander Sommer, partners composing said partnership, Thermal Research & Engineering Corporation, a corporation, Stephens-Adamson Mfg. Co., a corporation, Standard Steel Corporation, a corporation, and Beaumont Birch Company, a corporation, and each of them, are appellees.

Dated This 24th day of January, 1966.

C. M. Neal, of Neal & Neal,
Leroy Jeffers and Richard P. Keeton
(Attorneys for Plaintiff, Climax
Chemical Company.)

Filed January 26, 1966.

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1057

CLIMAX CHEMICAL COMPANY, *Petitioner,*

v.

C. F. BRAUN & Co., a corporation;
PENNSALT CHEMICAL CORPORATION, a corporation;
J. T. THORPE, INC., a corporation;
HEYWARD-ROBINSON COMPANY, a partnership;
BERNARD GOODMAN and ALEXANDER SOMMER, partners composing said partnership;
THERMAL RESEARCH & ENGINEERING CORPORATION, a corporation;
STEPHENS-ADAMSON MFG. CO., a corporation;
STANDARD STEEL CORPORATION, a corporation; and
BEAUMONT BIRCH COMPANY, a corporation,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT

(See inside cover for counsel)

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the 10th Circuit and the dissenting opinion are copied in the petition as Appendix B and Appendix C, and are reported at 370 F. 2d 616.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

(1) Whether a complaint which seeks to recover separate damages from numerous defendants for individual breaches of their separate contracts calling for different performances and which seeks to recover against one defendant for all the damages alleged to have resulted from the inoperable condition of plaintiff's manufacturing plant states separate and independent claims or causes of action within the meaning of Section 1441(c).

(2) Whether construction of Section 1441(c) to permit removal of an action in the absence of total diversity of citizenship violates the Constitution.

(3) Whether a removal bond executed by one defendant as principal is sufficient under Section 1446(d) when each of the other defendants filed joinders therein within the removal period and the surety subsequently ratified such bond.

STATUTES INVOLVED

In addition to those set forth in the petition at pp. 3-4:

Article I, Section 8, Clause 18 of the Constitution of the United States:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

STATEMENT

There are several portions of the petitioner's Statement of the Case which respondents submit are misleading or inaccurate or state conclusions which properly belong in the argument.

The complaint alleges that Braun guaranteed that the plant as designed would "handle and accommodate" certain materials (R. 7-8), not that the plant would "produce" specific quantities of the products. The reference to "a single injury" suffered by petitioner is not alleged anywhere in the complaint and is an attempt to determine the very issue which was decided adversely to petitioner by the Court of Appeals. The statement that one of the grounds for the Motion to Remand was that "there is a single cause of action and each respondent is jointly and severally liable thereon for a part of the total damages flowing from a single injury" is a misstatement of the language of the Motion to Remand (R. 35), is argumentative, and again merely recites petitioner's conclusion on the issue which was decided against petitioner by the Court below.

A more precise and succinct statement of the case than that contained in the petition is set forth in the first three paragraphs of the opinion of the Court of Appeals (Petition, App. B, pp. 6a-8a).

ARGUMENT

I.

THE DECISION ON SEPARATE AND INDEPENDENT CAUSES OF ACTION IN NO WAY CONFLICTS WITH THE PRIOR DECISION OF THE UNITED STATES SUPREME COURT.

Petitioner's argument that the decision conflicts with *American Fire and Casualty Co.* v. *Finn,* 341 U.S. 6 (1951), is based upon its misconstruction of the opinion below by Judge Aldrich.

The Court of Appeals devoted four paragraphs of its opinion to a discussion of the *Finn* case and to an application of its test for determining whether a separate and independent claim or cause of action exists. The "single wrong" test of *Finn* was clearly recognized by the Court below but after a thorough and succinct analysis of the true nature of petitioner's complaint it held that there was more than one primary right and more than a single wrong alleged. The principles laid down by the Supreme Court were not only recognized but were relied upon and carefully and correctly applied by the Court of Appeals in reaching its decision.

The assertion of alleged conflict is premised solely upon an attempted analogy between the facts of the *Finn* case and the facts alleged here. The Court of Appeals properly held that the facts of the two cases were readily distinguishable and that a different result must follow. The petitioner urges that simply because all of the units were to be installed in one plant and such plant would not function there was a single wrong and there could be no separate and independent causes of action. This was not what *Finn* meant by a single wrong.

Both Courts below recognized what petitioner consistently ignores, that the mere fact that Thermal's services and equipment were ultimately to be used at the same manufacturing plant as equipment of the other defendants does not turn different breaches of different contracts which call for totally different performances into a single wrong and does not change the separate and independent nature of the various claims. *Twentieth Century Fox Film Corp.* v. *Taylor,* 239 F. Supp. 913 (S.D. N.Y. 1965); *Greenshields* v. *Warren Pet. Corp.,* 248 F. 2d 61 (10th Cir. 1957).

By pointing out that petitioner's manufacturing plant was composed of a number of separate units and that whether one or several units failed to function the plant could not operate, the Court of Appeals was not making a finding of fact as petitioner alleges, but rather was taking notice of a fact situation which is readily apparent from the allegations of petitioner's complaint and which emphasizes the fallacy of petitioner's argument that there was only a single injury. The complaint alleges, for example, that the salt evaporating unit and the sulfuric acid vaporization unit constructed by Thermal were "essential parts" of the manufacturing plant, but no allegation is made that any of the defendants other than Braun and Thermal had anything whatever to do with those units.

It would be difficult to imagine causes of action more separate and independent than a claim against one corporation for manufacturing an evaporating unit and a claim against another corporation for manufacturing and selling certain unrelated valves. The alleged liability of the two corporations is not contingent upon proof of the same facts, and their liability is separate,

distinct and unrelated, as one corporation could be held liable while the other was exonerated. And as the Court of Appeals recognized:

> "The only possible question is whether the addition of Braun as a party defendant changes the result. Broken down into its component parts, the complaint makes two kinds of claims against Braun. First, it is alleged to be jointly liable with each of the other defendants for defects in the performance by each defendant of its individual contract. Second, it is alleged to be solely liable for all damages stemming from the inoperable condition of the plant, due to its poor engineering and design, for which none of the other defendants is liable. It may be granted that this latter claim is a single cause of action. However, by its very nature it is separate and independent of the causes of action asserted against the other defendants. Its presence weakens, rather than strengthens, plaintiff's present position." (Petition, App. B, p. 10a)

The Court then concluded that the case involved a number of additional claims against Braun and the other defendants that are separate and independent from the claim against Thermal and the fact that they related to the same plant was not enough.

It is apparent from a reading of the petition and of the opinion below that this is a case turning solely upon its own special facts and is only of consequence to the immediate parties involved. This factual situation is not a recurring one and the decision has no real consequences for other litigants in other factual situations, because the single wrong test set forth by the Supreme Court in *Finn* remains the guideline for determining the existence of separate and independent causes of action. As former Chief Justice Vinson said

in his address before the American Bar Association on Sept. 7, 1949, 69 Supreme Court V, VI:

> "If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

There are no "special and important" reasons compelling the exercise of this Court's discretion when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. See *United States* v. *Johnston,* 268 U.S. 220 (1925).

II.

THE DECISION GIVES FULL EFFECT TO SECTION 1441(c), AND IN NO WAY DEPARTS FROM THE TESTS CONTEMPLATED BY THE FINN CASE.

Petitioner takes out of its context one sentence from the majority opinion and incorrectly concludes therefrom that the Court of Appeals gave no effect to the separate and independent requirement of Section 1441 (c) and has permitted removal on the basis of separable controversies. Such conclusion is not only totally erroneous but grossly unfair.

Petitioner ignores that the Court accurately quoted Section 1441(c) in footnote two of its opinion and referred to "separate and independent" claims or causes of action on six occasions and devoted four paragraphs to a discussion of the Supreme Court's construction of Section 1441(c) in *Finn.* The Court

below applied the *Finn* test to the facts involved and concluded that petitioner had failed to bring itself within the single wrong test therein enunciated. A detailed explanation was given of why the claims or cause of action against Braun and the other defendants are separate and independent from the claim or cause of action against Thermal and Braun.

Furthermore, "separability" is simply an adjective form of the verb "separate" and there is no substantial difference in the meaning of the two. The 1948 addition of the term "independent" added a more substantive disassociation between the claims than existed theretofore, because it not only required that the claims be distinct but that they be self-sustaining and not resting upon each other for support. *Snow* v. *Powell,* 189 F. 2d 172 (10th Cir. 1951).

Petitioner's implication that the Court of Appeals ignored the revisions made by Section 1441(c) more than eighteen years earlier is totally without merit.

III.

THE DECISION OF THE COURT OF APPEALS IN NO WAY CONFLICTS WITH ITS OWN PRIOR DECISIONS OR WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioner's argument on this point only serves to emphasize why this Court should not grant certiorari. The substance of its argument is that the Court below erred in its judgment in that the particular facts alleged in this case cannot be distinguished in principle from the cases relied upon by the petitioner. This again reveals that the decision below turned solely upon an analysis of the peculiar facts of this case and that the decision will affect few other than the litigants in this lawsuit.

Judge Aldrich correctly stated that the cases relied upon by petitioner do not support its argument.

Willoughby v. *Sinclair Oil & Gas Co.*, 188 F. 2d 902 (10th Cir. 1951), was distinguished by the Court below on the ground that it involved only one wrong and the defendants were claimed to be jointly liable for *all* the damages, while here there was more than one wrong and the defendants were not alleged to be jointly liable for all of the damages. *Willoughby* was a wrongful death action brought because of the explosion of a hot water heater caused by the concurrent negligence of three defendants and its factual inapplicability to the instant case is readily apparent. *Snow* v. *Powell*, 189 F. 2d 172 (10th Cir. 1951) and *Donahue* v. *Warner Bros.*, 194 F. 2d 6 (10th Cir. 1952) were similarly distinguished. In *Snow* the plaintiff was struck by a hammer in a railroad depot and he sued his attacker and the railroad company to recover damages for what was obviously one wrong and one injury. In *Donahue* the only wrong alleged was the invasion of one person's right of privacy and all of the defendants were claimed to be jointly liable for all of the damage.

McLeod v. *Cities Service Gas Co.*, 233 F. 2d 242 (10th Cir. 1952), is readily distinguishable. Unlike the present situation, *McLeod* involved only one wrong stemming from the concurrence of separate acts of negligence and the defendants were alleged to be jointly liable for *all* the damage.

A single alternative recovery was sought against the school and its insurer in *Gray* v. *New Mexico Military Institute*, 249 F. 2d 28 (10th Cir. 1957), for a single bodily injury suffered by the plaintiff and the case thus bears no relation to the present case and in no way compels a different result.

Likewise, there is no conflict with *Charles Dowd Box Co.* v. *Fireman's Fund Ins. Co.*, 303 F. 2d 57 (5th Cir. 1962). The single wrong there alleged was the defendants' failure to pay compensation under their substantially identical fire insurance policies. Furthermore, a key factor in the *Dowd* decision was that:

> "... should one defendant be liable on the loss, all would be each in its pro rata share." (303 F. 2d 61)

The exact opposite is true in the instant case on both points. The contracts of the various defendants were not substantially identical and did not purport to render the same performance. If Thermal was held liable on the claim alleged against it, this would have no bearing whatever upon the liability of the other defendants such as Stephens-Adamson.

The statement by petitioner that the only predicate for the majority opinion was that each claim was under a separate purchase order or subcontract independently negotiated is totally inaccurate and misleading. The Court emphasized that each of the defendants was charged with making a separate and independent contract but that only one, Braun, agreed to design, engineer, construct and equip the plant. The separate and independent contracts were for different services of a highly specialized and individual nature, entered into on different dates and at different places, and promising performance at different times and at different places.

There were individual breaches of the individual contracts alleged to have occurred at separate places and at different times. Each alleged breach was predicated upon specific individual acts and gave rise to a single

wrong and a single claim for damages distinct from the breach by the other defendants. The liability of each defendant other than Braun was separate and distinct. As the Court of Appeals explained:

> "With the exception of Braun, no defendant assumed responsibility for other than its own unit, or was liable in any way for the failure of the others. We think it clear that there was more than one primary right, and that more than a single wrong was alleged. Absent Braun as a defendant, it is inconceivable that plaintiff could, simply because all units were to be installed in one plant, say that the separate claims against the several defendants were single and interdependent." (Petition, App. B, p. 9a)

The addition of Braun as some sort of attempted common denominator does not change the separate and independent nature of the claims. The complaint urges that Braun is jointly liable with each of the other defendants for their individual breaches of their individual contracts. Braun alone, however, is alleged to be liable for damages arising from the inoperable condition of the plant as a result of its defective design and engineering. The claim or cause of action against Braun and Thermal alleging joint liability for a part of the damage is separate and independent from each claim against Braun and the other defendants. Each of these claims is separate and independent from the claim against Braun alone.

The decision of the Court of Appeals is also consistent with its decision in *Greenshields* v. *Warner Pet. Corp.*, 248 F. 2d 61 (10th Cir. 1957), cert. den. 355 U.S. 909, which is not cited by petitioner. There the plaintiff sues numerous lessees and several plant opera-

tors who purchased gas from the lessees, alleging that his interest in an oil and gas field had been damaged by the contracts entered into by the defendants. The Court noted that the alleged wrongful acts of one of the plant operators occurred at a different time than those of the other defendants and consummated in a different result. Although all of the damages were to the plaintiff's interest in an oil and gas field, the Court held that the claim against the plant operator:

> ". . . arises from subsequent and different acts occasioning different results. It is a 'separate and independent claim' within the bounds of Section 1441(c) and as such permits removal to federal jurisdiction." (248 F. 2d 66)

The decision below does not conflict with any prior decision of the Tenth Circuit Court of Appeals or with the decisions of any other Court of Appeals and the petition should therefore be denied.

IV.

CONSTRUING 28 U.S.C., SECTION 1441(c) TO PERMIT REMOVAL OF SEPARATE AND INDEPENDENT CAUSES OF ACTION IN THE ABSENCE OF COMPLETE DIVERSITY OF CITIZENSHIP IS CLEARLY CONSTITUTIONAL.

The presumption of constitutionality which surrounds all legislation is, in this instance, strengthened by nearly a century of usage and judicial decision upholding the jurisdiction of Federal Courts to retain all aspects of a controversy between citizens of different states, including those aspects in which complete diversity does not exist. *Gaines* v. *Fuentes,* 92 U.S. 10 (1875); *Texas Employer's Ins. Ass'n.* v. *Felt,* 150 F. 2d 227 (5th Cir. 1945); *Kithcart* v. *Metropolitan Life Ins. Co.,* 150 F. 2d 997 (8th Cir. 1945), cert. den. 326 U.S. 777. Although these decisions dealt with the pred-

ecessors of Section 1441(c), the long history of permitting removal in diversity cases where there is less than complete diversity supports the constitutionality of the present statute.

The petitioner's first premise is that Article III, Section 2 of the United States Constitution requires complete diversity of citizenship between all plaintiffs and all defendants. However, complete diversity of citizenship is simply a statutory and not a constitutional limitation. *Twentieth Century Fox Film Corp.* v. *Taylor,* 239 F. Supp. 913 (S.D. N.Y. 1965). The requirement of complete diversity delineated in *Strawbridge* v. *Curtiss,* 3 Cranch 267 (1806), was merely a construction of the Judiciary Act of 1789 and not a construction of Article III, Section 2.

The Federal Courts have refused to require complete diversity in various other contexts. The jurisdictional requirements of the Federal Interpleader Act, 28 U.S.C., Sections 1335, 1397, 2361, have been held to be satisfied by "minimal diversity", i.e., by diverse citizenship of any two adverse claimants. *Haynes* v. *Felder,* 239 F. 2d 868 (5th Cir. 1957); *Pan American Fire & Cas. Co.* v. *Revere,* 188 F. Supp. 474 (E.D. La. 1960); Chafee, "Federal Interpleader Since the Act of 1936," 49 Yale L.J. 377 (1940). Complete diversity has neither been required in class actions, *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921), nor in intervention suits by co-citizens. *Wichita R.R. & Light Co.* v. *Public Util. Comm.,* 260 U.S. 48 (1922); *Phelps* v. *Oaks,* 117 U.S. 236 (1886). Also, the American Law Institute's proposals for federal adjudication of a broad range of multi-party litigation are predicated upon the constitutional validity of "minimal" diversity. A.L.I., Study of the Division of Jurisdiction

Between State and Federal Courts, Sections 2341-2346, and commentary at 119-159 (Tentative Draft No. 2, 1964).

The precise constitutional attack made by the petitioner in this case has been expressly rejected in *Twentieth Century Fox Film Corp.* v. *Taylor,* 239 F. Supp. 913 (S.D. N.Y. 1965). See also *Baltimore Gas & Elec. Co.* v. *United States Fid. & Guar. Co.,* 159 F. Supp. 738 (D. Md. 1958); and *Breslerman* v. *American Liberty Ins. Co.,* 169 F. Supp. 531 (E.D. N.Y. 1959). Moreover, this Court, in its first and only construction of Section 1441(c), noted in *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6 (1951), that the revisers carefully provided "an opportunity" for state courts to adjudicate non-federal causes of action, implying that such claims may be federally retained.

Petitioner has relied heavily upon the opinion of certain commentators that Section 1441(c) is of doubtful constitutionality, but actually most commentators have concluded that retention of non-federal claims under Section 1441(c) violates no constitutional limitation. Moore and Van Dercreek, "Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim under Section 1441(c)", 46 Iowa L. Rev. 489 (1961); Cohen, "Problems in the Removal of a 'Separate and Independent Claim or Cause of Action,'" 46 Minn. L. Rev. 1 (1961); Green, "Jurisdiction of U.S. District Courts in Multiple Claim Cases," 7 Vand. L. Rev. 472 (1954).

In summary, nothing in Article III of the Constitution prohibits Congress from opening the Federal Courts to non-federal claims, so long as any two adverse parties are of diverse citizenship. Section 1441

(c) simply represents one instance in which the Congress has made use of the full grant of power contained in Article III, Section 2.

Even if constitutional support for Section 1441(c) could not be found in Article III, Section 2, its validity may nevertheless be upheld under the "necessary and proper" clause of Article I, Section 8, of the Constitution. Congress has long been concerned that removal jurisdiction might result in the fragmentation of litigation resulting in totally unnecessary delay, inconvenience and expense. In *Barney* v. *Latham,* 103 U.S. 205 (1881), the Supreme Court recognized the validity of this policy and allowed the removal of a separable controversy to operate to transfer the entire suit to the Federal Court. While Congress limited the category of removable claims in 1948 and required of them a greater degree of disassociation, it still retained the policy of avoiding fragmentation of litigation.

Indeed, removal itself is a creature of the Congressional power to make all laws necessary and proper for carrying into execution all powers vested by the Constitution.

The need for Section 1441(c), which Congress recognized, is well illustrated by the instant case, where complete diversity between the corporate plaintiff and the nine widely scattered corporate defendants would exist except for the fact that Thermal, although having its principal place of business in Pennsylvania, had been incorporated in Delaware, as had plaintiff.

Furthermore, the constitutionality of Section 1441 (c) can be validly premised upon the doctrines of pendant and ancillary jurisdiction, under which Federal Courts adjudicate many types of claims for which

there is no independent jurisdictional basis rooted in Article III. Petitioner apparently contends that the necessary and proper clause and pendant and ancillary jurisdiction cannot save the constitutionality of Section 1441(c), because they are both based upon a close relationship between the federal claim and the non-federal claim, while Section 1441(c) requires that the claims be "entirely unrelated". Petitioner thus seriously misconstrues Section 1441(c).

The test laid down by this Court in *Finn* as to the determination of a separate and independent cause of action was whether or not there was a single wrong arising from an interlocked series of transactions. The emphasis was obviously placed upon the "single wrong" and the test has thus been applied by every court dealing with a construction of Section 1441(c). It is clear that Section 1441(c) would apply to allow removal if more than a single wrong were alleged, even if the multiple wrongs arose from an interlocked series of transactions. Such claims would certainly not be "entirely unrelated" but would fall within the contemplation and application of Section 1441(c).

The only other possible basis for petitioner's contention is the addition of the word "independent" to the statutory limitation of the types of claims that are removable under Section 1441(c). However, a simple analysis of the meaning of such word clearly reveals that its addition does not mean that the "separate and independent" claim must be "entirely unrelated" to the other claims. In *Snow* v. *Powell*, 189 F. 2d 172, 174 (10th Cir. 1951), the Court noted:

> "The word 'independent' means not resting on something else for support; self-sustaining, not contingent or conditioned."

Furthermore, the courts have recognized that simply because there will be questions of law and fact common to all of the claims and such claims arise out of the same or similar occurrences does not mean that such claims are not "separate and independent" within the meaning of Section 1441(c). *Scheideler* v. *Jones,* 105 F. Supp. 726 (S.D. N.Y. 1952); *Orn* v. *Universal Automobile Ass'n. of Indiana,* 198 F. Supp. 377 (E.D. Wisc. 1961); *Reynolds* v. *Bryant,* 107 F. Supp. 704 (S.D. N.Y. 1952). Indeed, after the *Finn* case had been remanded by the Supreme Court to the Fifth Circuit Court of Appeals, it was there recognized that "separate and independent" does not mean "entirely unrelated" as it was pointed out that non-federal claims relating to the same transaction or series of transactions could be retained for federal adjudication. *Finn* v. *American Fire & Cas. Co.,* 207 F. 2d 113 (5th Cir. 1953), cert. den. 347 U.S. 912 (1954).

Petitioner seemingly urges that whenever multiple parties are properly joined under Rule 20 of the Federal Rules of Civil Procedure, there can never be any separate and independent claims. It thus attempts to use Rule 20 to affect and limit the removal jurisdiction of the federal courts, although such argument was rejected by *Texas Employers Ins. Ass'n.* v. *Felt,* 150 F. 2d 227 (5th Cir. 1945), and by the draftsmen of the Federal Rules who provided in Rule 82 that:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein."

This contention was fully considered and ably rejected by Professor Moore in Volume 1A of *Moore's Federal Practice,* 2d Ed. Section 0.163 (4.-5) at p. 708.

Finally, we point out that the constitutionality of Section 1441(c) was not raised in either the District Court or the Tenth Circuit Court of Appeals and was not considered or passed upon by either court. In such circumstances, it has been held that the constitutional question cannot be raised for the first time before the United States Supreme Court either on certiorari or appeal. *Abel* v. *U. S.*, 362 U.S. 217 (1960); *Ullmann* v. *U. S.*, 350 U.S. 422 (1956); *Federal Trade Commission* v. *Travelers Health Ass'n.*, 362 U.S. 293 (1960); *Duignan* v. *U. S.*, 274 U.S. 195 (1927); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

In *Evangelical Lutheran Church* v. *Stanolind Oil & Gas Co.*, 251 F. 2d 412 (8th Cir. 1958), the plaintiff raised the question of the constitutionality of Section 1441(c) for the first time in the Court of Appeals. The Court disposed of the issue by pointing out that the question of constitutionality had never been raised in the pleadings in the lower court, at the time of the motion to remand, or at the time of trial. The Court of Appeals then held that the issue was not properly before it because of lack of timeliness.

Regardless of whether the question can be raised, however, it is apparent that the constitutional question was not litigated below, and we submit that this case does not provide the proper procedural framework for the disposition of such a fundamental issue by this Court.

V.

WHETHER THE REMOVAL BOND OF A SINGLE DEFENDANT CAN EFFECT REMOVAL FOR MULTIPLE CO-DEFENDANTS IS NOT SUCH A QUESTION AS SHOULD BE DECIDED BY THE UNITED STATES SUPREME COURT AND, FURTHERMORE, THE DECISION BELOW ON SUCH POINT WAS ENTIRELY CORRECT.

Petitioner makes the flat statement that this is an important question of federal law which should be decided by the United States Supreme Court, but has totally failed to give any "special and important reasons" which would bring this question within the guidelines discussed in *Rice* v. *Sioux City Memorial Park Cemetary,* 349 U.S. 70 (1955). The resolution of this problem by this Court might perhaps peculiarly benefit the litigants in this case but certainly does not involve the settlement of principles which are of importance to the public. There is no showing that this decision has any real or substantial consequences for multiple litigants in other situations and indeed no such showing can be made. This is a rather insignificant problem and one that does not have such far reaching consequences as to compel this Court to exercise its discretion to grant certiorari.

Moreover, the decision by the Court of Appeals for the 10th Circuit on this issue was clearly correct. Well within the twenty day removal period, the respondent Stephen-Adamson Co. filed a properly conditioned bond which it had executed as principal and which Western Surety Co. had executed as surety. (R. 25-26). Thereafter, also within the twenty day removal period, each of the remaining respondents filed a Joinder In Removal Proceedings whereby each agreed to be bound by the removal bond which had been filed. (R. 32-33) A Rider To Removal Bond was subsequently filed by

which all of the respondents agreed to be bound as principals by the bond, and by which the surety warranted that the removal bond had been in continuous force and effect from and after the execution date of the bond and that it had been at all times and remained liable to the full extent of the terms, conditions and obligations of the bond. (R. 36)

The clear purpose of Section 1446(d) is to afford the petitioner a remedy to recover his costs if it should be determined that the case was improperly removed. *Tucker* v. *Kerner,* 186 F. 2d 79 (7th Cir. 1950); *Chase* v. *Erhardt,* 193 F. 305 (Vt. 1912); *Nelson* v. *Peter Keiwitt Sons Company,* 130 F. Supp. 59 (N.J. 1955); *CIT Corporation* v. *Ambrose,* 36 F. Supp. 311 (E.D. S.C. 1940). This purpose was clearly satisfied by the bond of the respondent Stephens-Adamson and therefore the requirements of Section 1446(d) were fulfilled and the subsequent joinder in the bond by the remaining respondents was unnecessary.

Further, the only simple and effective means to adequately satisfy the requirements of the removal statute within the twenty day period when multiple defendants scattered throughout the country are involved is for one to file the petition and bond and the others to file their consents or joinders therein. This procedure has been specifically recognized in *Stangard Dickerson Corp.* v. *United Electric R & MW,* 33 F. Supp. 449 (N.J. 1940). See also 76 C.J.S. Removal of Causes, § 204 page 1063, and *Hunt* v. *Pearce,* 284 F. 321 (8th Cir. 1922). Cf. *Peter Holding Co.* v. *LeRoy Foods, Inc.,* 107 F. Supp. 56 (N.J. 1952) and *McMahan* v. *Fontenot,* 212 F. Supp. 812 (W.D. Ark. 1963).

There is nothing in the language of Section 1446(d) to prevent separate joinders being made to a bond

originally executed by only one defendant. Indeed, if the clear intention to be bound by the conditions expressed in Section 1446(d) appears, it is not even necessary that the bond be signed by the defendant. *Herbert* v. *Roxana Petroleum Corporation*, 12 F. 2d 81, (E.D. Ill. 1926); *Public Grain and Stock Exchange* v. *Western Union Telegraph Company*, 16 F. 289 (C.C. Ill. 1883); *Fayette Title and Trust Company* v. *Maryland P. & W. V. T. & T. Company*, 180 F. 928 (C.C. Pa. 1910).

Petitioner contends that only Stephens-Adamson was a principal on the bond and that the purported joinder of the other parties discharged the surety. It is clear, however, that the mere fact that the obligation of some person is added to that of the principal does not release the surety. 144 A.L.R. 1266, 1267. There was no change in the surety contract and the surety was not adversely affected.

Moreover, even if it should be concluded that the surety was adversely affected by the joinders, it cannot be said that the bond was void from that point on. At most it was voidable at the option of the surety and such alleged defect cannot be availed of by the petitioner. Finally, it must be remembered that the surety ratified and confirmed the bond. The law is clear that even though the removal period has expired, a defective removal bond can be validly ratified, *Gallahar* v. *Geo. A. Rheman Co.*, 50 F. Supp. 655 (S.D. Ga. 1943), or cured by amendment. *National Quicksilver Corp.* v. *World Insurance Co. of Omaha*, 139 F. 2d 1 (8th Cir. 1943); *Gray* v. *Oregon Shortline R. Co.*, 37 F. 2d 591 (S.D. Idaho 1930); *CIT Corporation* v. *Ambrose*, 36 F. Supp. 311 (E.D. S.C. 1940); *Hodge* v. *Chicago & A. Ry. Co.*, 121 F. 48 (8th Cir. 1903); *Chase* v.

Erhardt, 198 F. 305 (Vt. 1912); *Dennis* v. *Alachua County,* 3 Woods 683, 7 Fed. Cas. p. 467, No. 3791 (C.C. Fla. 1877). The authorities also agree that a defect in a removal bond is merely a procedural and not a jurisdictional defect. *Tucker* v. *Kerner,* 186 F. 2d 79 (7th Cir. 1950); *James Rivers Apartments* v. *Federal Housing Administration,* 136 F. Supp. 24 (Md. 1955); *Covington* v. *Indemnity Insurance Co.,* 251 F. 2d 930 (5th Cir. 1958); 1A *Moore's Federal Practice* § 0.168 (3.-7), p. 1286.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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